85-629

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

GLADYS CUNNINGHAM, PETITIONER

VERSUS

HOUSING AUTHORITY OF THE CITY OF OPELOUSAS d/b/a OPELOUSAS HOUSING AUTHORITY
RESPONDENT

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
# PETITIONER'S APPLICATION FOR WRITS

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the hiring of a less qualified person (White male) in order to effectuate an alleged political pay off is a legitimate non-discriminatory reason for not hiring a protected minority (Black female) or is such action violative of the Civil Rights Act of 1964 and the 5th and 14th Amendments to the U.S. Constitution?

2. Whether a defendant's failure to offer any evidence (once plaintiff has proven a prima facie case) which could be construed as rebuttal in a Title VII action, concedes the case as a matter of law and is it error for an appellate court to refuse to review the trial courts decision with respect to same except under the clearly erroneous standard?

3. Whether or not the trier of fact abused its discretion (and the Court of Appeals erred in affirming) in ordering the taking of the testimony of another witness long after the trial has concluded said testimony being relied on to re-

but plaintiff's prima facie case, when the defending party had every opportunity to call the witness at the original trial, but failed to do so?

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

The petition of Gladys Cunningham, respectfully prays, that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered herein on August 14, 1985, when a petition for rehearing was denied, the original opinion of said court having been entered on July 5, 1985, said opinion affirming the judgment of the United States District Court for the Western District of Louisiana.

OPINIONS BELOW

The Court of Appeals entered its decision affirming the dismissal of plaintiff's complaint on July 5, 1985. A copy of the decision is attached as appendix "C". The court denied plaintiff's petition for rehearing on August 14, 1985. A copy of said order is attached as appendix "D". The district courts opinion was rendered May 1, 1984, and is attached as appendix "A". The dis-

trict courts denial of application for rehearing is also attached as appendix "B".

## JURISDICTION

The judgment of the Court of Appeals was entered on July 5, 1985. A timely petition for rehearing was denied on August 14, 1985. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. Sec. 1254(1). The District Court had jurisdiction under the Civil Rights Act of 1964, Title VII, 4200c Sec. 2000e et. seq. 42 U.S.C. 1981, 1982, 1983 and 28 U.S.C. 1343 and 1331.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment V:

. . . Nor shall any person . . . be deprived of life, liberty, or property, without due process of law . . . .

United States Constitution, Amendment XIV:

. . . Nor shall any State deprive any person of life, liberty or property, without due process of law.

42 U.S.C. Sect. 1981:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other."

42 U.S.C. Sec. 1982

"All citizens of the United States shall have the same right, in every state and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property."

42 U.S.C. 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State of Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the Party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U.S.C. Sect. 2000e:

"(a) It shall be an unlawful employment practice for an employer - (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employee or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

## STATEMENT OF THE CASE

The plaintiff received a right to sue letter from E.E.O.C. on September 4, 1981 more than 180 days after she filed a charge with said agency complaining of racial and sexual discrimination by the Opelousas Housing Authority. Suit was filed on November 25, 1981. Said suit was instituted pursuant to Title VII of the Act known as "The Civil Rights Act of 1964". 42 USC, Sec. 2000e et seq., 1981, 1982 and 1983; the United States Constitution, more particualrly the Fifth and Fourteenth Amendments thereto. Defendant filed it's answer January 5, 1982 contending the court lacked jurisdiction, improper venue, that the complaint failed to state a claim upon which relief could be granted and generally denying the allegations. In due course trial was had

and against the plaintiff dismissing plaintiff's suit at her cost. (App. "A")(Not reported)

An appeal was taken to the United States Court of Appeals for the Fifth Circuit. On July 5, 1985 said court affirmed the District Courts decision, Cunningham vs. Housing Authority of City of Opelousas No. 84-4481, not reaching appellants specific allegations of error, but instead wrongfully applying the clearly erroneous standard of review to issues of law. (App. "C") Rehearing was denied on August 14, 1985. (App. "D")

## REASONS FOR GRANTING THE WRIT

The trial court found that plaintiff had established a prima facie case, we quote from that opinion as follows:

"I find that Gladys Cunningham was more qualified than Soileau to fill the position of executive director of the housing authority. I also find from the evidence that on or shortly before July 4, 1977, when plaintiff learned of Giron's resignation she telephoned board chairman Walter Richards and advised him of her interest in filling the vacancy. On July 4, 1977 the plaintiff discovered by word of mouth of a

hastily called board meeting to select a new director. She attended the board meeting later that day and Richards would not allow her to speak. With this evidence, the plaintiff established a prima facie case and the burden shifted to the defendant "to articulate some legitimate, non-discriminatory reason for the employee's rejection." McDonnell Douglas Corp. v. Green, 411 U.S. at 802."

However, the court went on to find that another individual (White male) was hired to repay a political debt and dismissed plaintiff's suit. It is felt that this is not supported by the evidence and if it was it would not be legitimate non discriminatory reason for not hiring petitioner.

It has been held that the dismissal of a public employee, not otherwise protected by Civil Service, because of his or her political associations or beliefs violates the 5th and 14th Amendments of the United States Constitution. Burns v. Elrod 509 F. 2d 1133 (1975), affirmed Elrod v. Burns 427 U.S. 347. Surely the same rule applies with respect to hirings and or promotions, in that either action effects a con-

stitutionally protected property right. Discharge or refusal to hire or promote a public employee for political affiliation or support or the lack of same affects constitutional rights in two ways. It indirectly abridges the right of association, and it establishes distinctions based upon political allegiance or the lack thereof that has the propensity to deny a class of people equal protection of the laws. Both effects require the courts to examine job actions based on political connections or the lack of same and to declare it unconstitutional unless it is found to serve important government interest. See Elrod v. Burns 427 U.S. 347 at 368. This inquiry was not even addressed in the case at bar. Although it is not expressly mentioned in the constitution freedom of association or to refrain from association is guaranteed by the 5th and 14th Amendments. U.S. v. Robel 389 U.S. 258, 263 (1967); NAACP v. Alabama, 357 U.S. 449 (1958); Williams v. Rhodes, 393 U.S. 23,30 (1968).

Although defendant did not plead nor present any evidence showing that defendant hired the less qualified White male instead of plaintiff to repay a political debt, the trial court so found, and concluded that because this was the case plaintiff could not recover. We feel that in so holding the court committed an error of law and should have been reviewed as such by the Court of Appeals.

The plaintiff has a burden of proving, by a preponderance of the evidence, a prima facie case of discrimination. The prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). If the plaintiff successfully proves the prima facie case, the evidentuary burden shifts to the defendant "to articulate some legitimate, non discriminatory reason for the employee's rejection." McDonald Douglas Corp. v. Green 411

U.S. 792, 802, 93 S. Ct. 1870, 1874, L. Ed. 2d 688 (1983). The defendant must, under the law articulate, not suggest or infer or deny and have the court conclude the opposite of their denial, and thus give them a defense as was done in this case.

It was held in McCormick v. District of Columbia 554 F. Supp. 640 (1982) that the requirement that explanation given by defendant in Title VII case be precise flows in part from requirement that plaintiff be afforded full and fair opportunity to demonstrate the pretext. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq. See note 5.

Gerald Emon was the only witness at trial who stated that the commission's action in general were politically motivated, but he offered no facts to back this up. Tr. P 50, 51 & 63. His assertion that he felt politically alligned with plaintiff is not even confirmed by Mr. Richards (one of the persons who voted to hire the less

qualified male) who testified he did not know what political side petitioner was on, Tr. P 95. L. 15-16, and Mr. Zarrange (who voted against the hiring of the less qualified male) testified his vote was not politically motivated but for or against a person on qualifications. Tr. P. 69 L. 12-24.

The Equal Employment Opportunity sub-chaper of the Civil Rights Act of 1964, prohibits discrimination in employment or on account of race, color, religion, sex or national orgin, and guarantees that all employees are entitled to the same expectation without such discrimination. The purpose or objectives of those provisions are to achieve equality of employment opportunities for all persons and to remove any past discrimination barriers and to cause employment to be based only upon applicable job qualifications. To achieve these purposes, the provisions must be liberally construed. 14 C.J.S. Civil Rights Supplement Section 62, page 114.

It has been held plaintiff in employment discrimination case need not prove that a particular decision or procedure is racially or sexually modivated if he or she can establish that the procedure or practice has a disciminatory impact on members of a particular protected class and "cannot be defended as a business necessity." Whack v. Peabody and Wind Engineering Company, 595 F. 2d 190 (1979). Certainly, the act complained of in this cause cannot be defended as a business necessity, nor was this a confidential or policy making position under Elrod v. Burns cited above.

The trial court cited King v. Seabord Coast Line R.R. Co., 538 F. 2d 581, 583 (14th Cir. 1976) and Garcia v. Gloor 618 F. 2d 264, 269 (5th Cir. 1980) for the proposition that, the act does not cover other types of discrimination, however unfair. That is correct, however the 5th and 14th Amendments do and it has been held that a discriminatory intent is not necessary,

Scott v. City of Anniston, Alabama, 48 L.W. 2056 (5th Cir. 1979). Therefore whatever was defendant's intent (to reward a political favor or otherwise), the effect was discrimination. Sex discrimination is clearly evidenced by the fact that at the July 4th meeting the three board members even discussed hiring a male janitor among themselves and with the janitor) but not plaintiff, Tr. P 83 L.2. and thereafter. See also Whack v. Peabody and Wind Engineering Co. 595 F. 2d 190 (1979) and Gilbert v. General Electric Co. 519 F. 2d 661 (1975), "It is of no moment that an employer may not have deliberately intended sex-related discrimination; the statute looks to consequences, not intent". We therefore respectfully suggest that the trial court erred as a matter of law in concluding that to overlook a better qualified protected minority to hire a less qualified so called political friend is not prohibited under federal law. Note the recent holding in Hishon v. King and Spalding

104 S.C.T. 2229 (1984), wherein it was held that those benefits that comprise the "incidents of employment" may not be afforded in a manner contrary to Title VII. Civil Rights Act of 1964 Sec. 701 et seq., as amended, 42 U.S.C.A. Sec. 200e et seq. The court therein further held that a benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion.



The Court of Appeals pointed out that appellant did not "specifically argue that the District Court's negative determination of the discrimination issue was clearly erroneous." P. 5267. (App. "C") That is correct and the reason therefor is that appellant takes the position that an error of law was committed by the trier and that Rule 52a of the Circuit does not apply to the review of errors of law. The trial court held that plaintiff proved a prima facie case. This Honorable Court reviewed the effect of plaintiff establishing a prima facie case in U.S. Postal Service v. Aikins, 103 S. Ct.

1478 wherein it stated:

By establishing a prima facie case, the plaintiff in a Title VII action creates a rebuttable "presumption that the employer unlawfully discriminated against" him. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254, 101 S. Ct. 1089, 1094, 67 L. Ed. 2d 207 (1981). See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). To rebut this presumption, "the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. (Emphysis ours) Burdine, supra, 450 U.S., at 255, 101 S. Ct. at 1094. In other words, the defendant must "produce evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, non discriminatory reason." Id., at 254, 101 S. Ct. at 1094.

There was no positive testimony, from the parties involved, as to any reason why a less

qualified White male was hired instead of plaintiff a female, and therefore a member of a protected minority. We mean by that, that all three of the board members who voted to hire this White male denied that it was for any reason other than they wanted to do so. The mayor who appointed the three board members, in a deposition after trial which was ordered by the court over our objection, denied he had ordered the less qualified person hired or that it was a political pay off. There was only the inference that this was done for political purposes, because the board members and the person who was hired had supported the mayor in his election. We take the position that this mere inference is not sufficient to rebut a prima facie case of discrimination. We would call the courts attention to the case of Saracini v. Missouri Pacific Railroad Company, 431 F. Supp. 389 (E.D. Ark. 1977) wherein Chief Judge Nicol, after finding plaintiff had established a prima facie case, described the defendant's burden at

page 393 as follows:

"It is the opinion of this court that defendant must meet this burden on two fronts. Initially it must demonstrate that its promotion procedure as applied to the position in question in this case, is non-discriminatory. Secondly, it must show that the promotion procedure did not discriminate against plaintiff. See Peltier v. Fargo, 533 F. 2d 374 (8th Cir. 1976)."

Chief Judge Nipol then found the promotion procedure to be discriminatory for the reason that it violated the requirements set forth in Rowe v. General Motors Corporation, 457 F. 2d 348 (5th Cir. 1972) which reporbated the practices of White foremen asking recommendations for promotion based on vague, subjective criteria. The court found such a method provided ". . . a ready mechanism for discrimination . . ." Rowe v. General Motors Corporation, supra, at p. 359. We would suggest to this Honorable Court that to allow an entity to rebut a prima facie case by the inference that the questioned hiring was to pay off a political friend also provides a ready mechanism for discrimination, and that further this is not a legitimate non-discriminatory

reason for not hiring plaintiff. It's easy to claim one voted for you or is a political friend but is this a valid reason to overlook one protected by federal statute. While some subjectively may be unavoidable in the selection of an Executive Director, it was pointed out by Chief Judge Nicol in the Saracini case that such" . . . subjective standards to be used, however, must be non-discriminatory, and related to job performance, and the applicants must be made aware of them in advance." Ibid., at page 394. Obviously such was not the case herein.

It is true that the courts have spoken to the premises that once a defendant articalates a legitimate non discriminatory reason for its action or inaction the factual inquiry proceeds to a new level of sepecificity, however this is correct only if defendant does so. E.E.O.C. v. Exxon Shiping Co. 745 F. 2d 967 (972). It therefore follows that if defendant does not plaintiff must prevail as he has established his case prima facie which standing

defense was that defendant did not apply which the court found not to be the case.

The Court of Appeals cited Aikens (cited above) for the proposition that once a defendant puts on evidence to rebut a prima facie case the McDonnell-Burdine presumption "drops from the case", however that case had to do with whether the question of a prima facie case need be addressed once a defendant has attempted to rebut, whereas in this case we have a situation where no actual rebuttal was attempted. The only defense was that defendant did not apply which the trier rejected. Our point is that we recognize that an articulated, although not proven, rebuttal will require the factual inquiry to proceed to a new level of specificity, however no rebuttal at all concedes the case to plaintiff who has proven a prima facie case as a matter of law. Further, the 5th Circuit Court of Appeals took the the position as late as 1982 in Pouncy v. Prudential Ins. Co. of America, 668 F. 2d 795, that:

"The ultimate issue-- whether the appellant was the victim of racial discrimination--is a question of ultimate fact to which the clearly erroneous rule does not apply. Consin v. Board of Trustees 648 F. 2d 293, 296 & n.3 (5th Cri. 1981)".

The Pouney decision has it's roots in the Supreme Court decision of Baumgartner v. U.S., 64 S Ct. 1240 in which the issue was whether or not the findings of the two lower courts satisfied the clear and convincing standard of proof necessary to sustain a denaturalization decree. The Court held that the conclusion of the two lower courts that the exacting standard of proof had been satified was not an unreviewable finding of fact but one that a reviewing court could independently assess. The court referred to the finding as one of "ultimate" fact, which in that case involved an appraisal of the strength of the entire body of evidence. Although this Honorable Court said in Pullman-Standard v. Swint, 102 S.Ct. 1781 (1982) that:

"Whatever Baunmgartner may have meant by its discussion of "ultimate facts", it surely did not mean that whenever the result in a

case turns on a factual finding, an appellate court need not remain within the constraints of Rule 52(a). Baumgartner's discussion of "ultimate facts" referred not to pure findings of fact--as we find discriminatory intent to be in this context--but to findings that "clearly impl(y) the application of standards of law." 322 U.S., at 671, 64 S. Ct., at 1243."

It is clear that the issue herein is at least a mixed question of law and fact and is thus independently reviewable and it was error for the court of appeal not to do so. Further, if it is assumed arguendo that we are dealing with a fact question it has been held and we believe it is the law that a finding of fact should be held clearly erroneous if the record lacks substantial evidence to support it. Ward v. Hobart Manufacturing Co. 450 F. 2d 1176; Lincold v. Board of Regents of University System, 697 F. 2d 928 (1983). In the case at bar there is no direct and credible evidence that the less qualified White male was hired and petitioner was not to reward the less qualified person for past political favors. There is only supposition. We therefore feel the trial court was in

error in concluding that the inference that one is hired to repay a political debt is sufficient evidence to rebut a prima facie case, and the court of appeals erred in affirming the decision. It should take postive evidence and the evidence should tend to prove a legitimate (non discriminatory) reason for not hiring plaintiff.

3.

Although the Court of Appeals pointed out that Rule 614 of the Federal Rules of evidence permits the court to call witnesses on its own motion, it is felt that it was error for the court to do so in this case and in fact in this type of case at all. In the case at bar the trial court reopened the evidence on its own motion weeks after the conclusion of the trial to allow the defendant to put on a witness by deposition to rebut plaintiff's prima facie case on the question of political payoff. That witness was the former mayor of Opelousas and the

court relied on the testimony in deciding that the less qualified White male was hired to repay a political favor rather than plaintiff not being hired because of her sex.

We found no authority for a court reopening the evidence on it's own motion in a Title VII case to permit a litigant to establish a vital part of its case when it has failed to do so by the close of the evidence. We realize the court is vested with wide discretion with respect to new trials and since this was tantamount to the granting of a new trial we reviewed the authority in this area. Clearly under the federal rules the court may order a new trial of its own initiative 28 U.S.C. A. Rule 59(d). The motion may raise questions of law arising out of alleged substantial errors in admission of rejection of evidence. Montgomery Ward & Co. v. Duncan 61 S. Ct. 189, 311 U. S. 243, 85 L. Ed. 147. However, it has been held that a new trial will not be granted merely be-

cause a party has, through some misconception of his rights, failed to develop his case as fully as he might have done. Bronstein v. Pennsylvania R.R. 33 F. Supp. 716. This is precisely what the court permitted on its own motion in this case. The failure of a party to call an available witness to meet issues raised at the trial does not justify reopening the case. Eastern Airlines v. U.S. 110 F. Supp. 499. It has been held that the Federal Rules of Civil Procedure, 28 U.S.C.A., do not permit a litigant to seek a new trial on the ground that there existed evidence which the counsel who tried the case failed to present to the court because of his failure to evaluate it properly, Aerated Products Co. of Los Angeles v. Aeration Processes 95 F. Supp. 23, or because he felt that sufficient testimony was adduced to establish the point desired without offering the evidence. Raudenbush v. Baltimore & O.R.R. 65 F. Supp. 6. Likewise a party who has lost a case tried on one

theory is not entitled to a new trial so that he can try it on another theory. Gearhart v. WSAZ, Inc. 150 F. Supp. 98 affirmed 254 F. 2d 242.

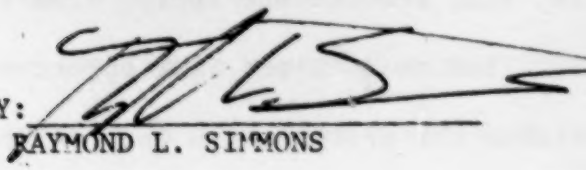
CONCLUSION

Considering the cases cited above there appears to have been no legitimate reason for re-opening the evidence to allow a defendant to attempt to perfect his defense, when he had ample opportunity to call the witness during trial, but failed to do so. Especially in this type of case when the courts have long held that defendant had to articulate a legitimate, non-discriminatory reason for petitioner's rejection if petitioner first proves a prima facie case. If this course is followed then petitioner will be in a position to demonstrate the pretext. Further, it was also held in the McCormick v. District of Columbia, 994 F. Supp. 640 (1982) that the requirment that the explanation given by defendant be precise stems in part from the requirement that plaintiff be

afforded a full and fair opportunity to demonstrate that the explanation is a pretext. In this case the defendant did not articulate a reason for plaintiff not being hired beyond what the court found not to be the case, that is, that she did not apply. Therefore plaintiff had no full and fair opportunity to demonstrate the pretext. In fact defendant did not offer a positive pretext, there was only the inference. Further, humble counsel for plaintiff seriously contends that an illegal contract and paying off political debts with public money should not be a ligitimate non discriminatory reason for denying plaintiff this position. Otherwise how far could this illegality and impropriety be taken, could overlooking one in plaintiff's position be justified because public official wanted to pay off a gambling debt, I think not.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I, RAYMOND L. SIMMONS, counsel for petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify, that on the 11th day of October, 1985, I served three copies of the petition for Writ of Certiorari and its companioned Appendices by serving the opposing counsel of record for Respondents by regular first class United States Mail, properly postage prepaid, whose name and address are as follows:

Felix A. DeJean, III
129 North Court Street
Opelousas, Lousisiana

Baton Rouge, Louisiana, this 11th day of October, 1985.

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appendix 'A'

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

GLADYS CUNNINGHAM, ET AL

VERSUS

CIVIL ACTION NO. 81-2177

HOUSING AUTHORITY OF THE CITY OF OPELOUSAS D/B/A OPELOUSAS HOUSING AUTHORITY

MEMORANDUM OPINION

Gladys Cunningham, a black woman, filed this suit against the Housing Authority of the City of Opelousas, Louisiana, (housing Authority) asserting that the defendant had violated numerous rights secured to her by the Constitution and statutes of the United States by refusing to hire her as executive director of the authority because of her race and sex. Plaintiff withdrew her claim of racial discrimination and narrowed her claim to one of sex discrimination. She alleges that despite her superior credentials, the authority hired Bill Soileau in violation of Title VII of the Civil Rights Act of 1964.

42 U.S.C. §§ 2000e, et seq.

The housing authority contends that Mrs. Cunningham never applied for the position, but even if she did apply, her rejection was politically rather than sexually motivated.

FACTS

In March 1977 the five man board of directors of the housing authority, by a three-two vote elected to remove the acting director, Ashton Giron, and hire Soileau to file the vacancy. Soileau received the votes of Commissioners Norton, Richards and Robertson. Giron responded by obtaining an injunction from State District Court to prevent his removal. Joseph Powers, the mayor of Opelousas, decided to retain the three commissioners who had previously voted to replace Giron with Soileau and Mr. Giron dismissed the injunction and resigned in June 1977. At this point, the three board members who voted together previously were able to again select their candidate, Soileau, as

executive director.

The five member board had two political factions: Emon and Zerangue, who were White and Norton, Richards, and Robertson, who were Black. Emon and Zerangue were not politically aligned with Mayor Powers, Norton, Richards, and Robertson were aligned with Powers; in fact they were appointed by Powers to the board. The evidence clearly indicated and I find that the three Black board members, Norton, Richards and Robertson selected Soileau for carrying political water for Mayor Powers. Soileau had actively supported Powers in his successful ract for mayor. Soileau had previously run for sheriff in St. Landry Parish and was very active in Parish and City politics.

Mrs. Cunningham presented impressive credentials for the position: (1) a high school degree, (2) a bachelor of arts in elementary education from Southern University, and (3) certificates for attending training sessions

in the following areas: business management, housing management, bi-lingual training, desegration sensitivity, and teacher training.

At the time the position of executive director became vacant, Cunningham was employed by the housing authority in the capacity of day care director and community service coordinator.

Soileau was a high school graduate and had fourteen years experience as a chief deputy sheriff.

DISCUSSION

To establish a prima facie case of sex discrimination a Title VII complainant must prove: (1) she applied and was qualified for a job for which the employer was seeking applicants; (2) despite her qualifications, she was rejected; and (3) after her rejection, "the position remained open and the employer continued to seek applicatns from persons of complaint's qualifications." McDonnell

Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

I find that Gladys Cunningham was more qualified than Soileau to fill the position of executive director to the housing authority. I also find from the evidence that on or shortly before July 4, 1977, when plaintiff learned of Giron's resignation she telephoned board chairman Walter Richards and advised him of her interest in filling the vacancy. On July 4, 1977, the plaintiff discovered by word of mouth of a hastily called board meeting to select a new director. She attended the board meeting later that day and Richards would not allow her to speak. With this evidence, the plaintiff established a prima facie case and the burden shifted to the defendant "to articulate some legitimate, non discriminatory reason for the employee's rejection." McDonnell Douglas Corp., 411 U.S. at 802.

Defendant successfully rebutted the plaintiff prima facie case by establishing that the

Soileau selection in July 1977 was merely the reaffirmation fo the March 1977 decision by three board members to repay Soileau for his political support of Powers by appointing Soileau ad the executive director. Under these cricumstances, the burden shifted to the plaintiff to prove that the apparent explanation offered by the defendant for declining to hire plaintiff was only a "pretext for discrimination."

Cunningham failed to meet this burden. The defendant established that the decision to hire Soileau in July 1977 was not motivated by reason fo sexual discrimination toward Cunningham. The hiring was motivated by the affirmative desire of three board members to place Soileau in the position of executive director to repay a political debt. "Title VII is limited in application to discrimination in employment based on race, color, religion, sex or national origin; it does not cover other

types of discrimination, however unfair they may be." King v. Seaboard Coast Line R.R. Co. 538 F. 2d 581,583 (4th Cir. 1976). See also Garcia v. Gloor, 618 F. 2d 264, 269 (5th Cir. 1980) (Act directed at specific types of discrimination).

"The ultimate burden of establishing discrimination remains with the plaintiff at all times. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.: Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256(1981).

This ultimate burden was never met, so a judgment must be rendered in favor of the Opelousas Housing Authority.

Lafayette, Louisiana, this the 1st day of May, 1984.

s/W. Eugene Davis
United States Circuit Judge
(Sitting by Designation)

Appendix "B"

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

GLADYS CUNNINGHAM — CIVIL ACTION NO. 81-2177

VERSUS

THE HOUSING AUTHORITY OF THE CITY OF OPELOUSAS, LOUISIANA

RULING ON MOTION

Plaintiff's Motion for a new trial is DENIED.

Lafayette, Louisiana, this 19th day of June, 1984.

s/W. Eugene Davis
UNITED STATES CIRCUIT JUDGE
(Sitting by Designation)

Appendix "C"

GLADYS CUNNINGHAM,
Plaintiff-Appellant

VERSUS NO. 84-4481

HOUSING AUTHORITY OF THE
CITY OF OPELOUSAS d/b/a
OPELOUSAS HOUSING AUTHORITY,
Defendant-Appellee

United States Court of Appeal
Fifth Circuit.

July 5, 1985.

Title VII sex discrimination suit was brought against housing authority for its failure to hire plaintiff as executive director. The United States District Court for the Western District of Louisiana, W. Eugene Davis, J., entered judgment in favor of the housing authority, and plaintiff appealed. The Court of Appeal held that finding that plaintiff failed to meet her burden of demonstrating intentional discrimination was not clearly erroneous.

Affirmed.

1. CIVIL RIGHTS 9.10, 43

Disparate treatment model of proving discrimination is applicable in situations involving subjective hiring and promotions decisions and, under that model, plaintiff bears burden of proving intentional discrimination. Civil Rigths Act of 1964, § 2000e et seq.

2. CIVIL RIGHTS 43

Plaintiff, who brought Title VII sex discrimination case against housing authority for its failure to hire her as executive director, was properly required to prove intentional discrimination. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

3. CIVIL RIGHTS 43

To establish prima facie case of sex discrimination in a Title VII case, complainant must demonstrate that she applied for and was qualified for a job for which employer was seeking applicants, that she

was rejected despite her qualifications, and that position remained open after her rejection and the employer continued to seek applicants from person of complainant's qualifications. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

4. FEDERAL COURTS 858

Finding that plaintiff failed to prove discrimination on basis of her sex was reviewable under clearly erroneous standard. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

5. CIVIL RIGHTS 44(5)

Finding that plaintiff, who brought Title VII sex discrimination case against housing authority for its failure to hire her as executive director, failed to meet her burden of demonstrating intentional discrimination was not clearly erroneous. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C. A. § 2000e et seq.

6. FEDERAL CIVIL PROCEDURE 1343

In sex discrimination case tried to the court, trial court did not abuse its discretion by ordering parties to take deposition of a witness after court had taken the case under submission. Fed. Rules Evid. Rule 614, 28 U.S.C.A.

Appeal from the United States District Court for the Western District of Louisiana.

Before REAVLEY, JOHNSON, and HIGGINBOTHAM, Circuit Judges,

PER CURIAM:

Gladys Cunningham appeals from an adversus judgment in her Title VII sex discrimination case against the Housing Authority of the City of Opelousas, Louisiana (Housing Authority), for its failure to hire her as executive director of the Housing Authority. The district court concluded, after a full trial that Cunningham had failed to meet her burden of demonstrating intentional discrimination. This Court affirms the judgment of the district court.

## I. BACKGROUND

The Housing Authority is directed by a five member board. At the time of the events critical to the determination of this case, three of those members were appointed by the then Mayor of Opelousas, Joe Powers. The other two board members were not Powers' appointees; they also were not politically aligned with Powers. Prior to July 4, 1977, the position of Housing Authority executive director was filled by Ashton Giron. In March 1977, the Housing Authority board attempted to remove Giron and replace him with Bill Soileau. Giron, however, obtained a temporary restraining order preventing his replacement by Soileau. Eventually, Giron abandoned his claim for injunctive relief, and he resigned his position on June 30, 1977. On July 4, 1977, the board hastily called a special meeting and voted to replace Giron with Soileau.

Gladys Cunningham (Cunningham) is a female who was then ( and is now) employed by the Housing Authority. Prior to the July 4th meeting, Cunningham was employed by the Housing Authority as day care director, a position she had held for some time. When Cunningham learned of Giron's resignation, which was some time before the July 4th meeting, she informed the chairman of the board that she intended to apply for the position of executive director. Cunningham learned of the hastily called July 4th meeting and attended it. During the meeting, Cunningham attempted to address the board in order to inform the entire board her interest in the executive director position. The board denied her that opportunity.[1] The board then formally hired Soileau, even though Cunningham was better qualified for the position.[2]

1. One of the issues at trial was whether Cunningham had actually applied for the position. The Housing Authority contended that Cunning-

Cunningham sued the Housing Authority alleging sex discrimination in violation of Title VII, 42 U.S.C. § 2000e, et seq; 42 U.S.C. §§ 1981, 1982 and 1983; and the fifth and fourteenth amendments to the United States Consitution.[3] Cunningham's case was tried to the court and the district court concluded that Cunningham failed to meet her ultimate burden of proving discrimination on the basis of sex. The district court concluded that Soileau was hired because of the local political situation:

ham had not applied for the vacancy, and that was the reason that she was not considered for the position. The district court found, however, that Cunningham had indeed applied for the position, and that finding is not challenged in this appeal.

2. The district court found that Cunningham was more qualified for the position than Soileau. Cunningham's credentials included a high school diploma, a bachelor of arts degree in elementary education, and certificates for attending several pertinent training sessions. Soileau, on the other hand, was a high school graduate with fourteen years of experience as a chief deputy sheriff.

3. Cunningham also alleged race discrimination, but that claim was dropped

> The evidence clearly indicated and I find that the three black board members, Norton, Richards, and Robertson selected Soileau for carrying political water for Mayor Powers. Soileau had actively supported Powers in his successful race for mayor. Soileau had previously run for sheriff in St. Landry Parish and was very active in parish and city politics.

Record Vol. I at 186.

Cunningham appeals asserting two grounds of error. As her first ground of error, Cunningham asserts that the district court erred in concluding that the Housing Authority had rebutted her prima facie case of discrimination for two reasons. First, Cunningham asserts that the Housing Authority did not sufficiently articulate that Soileau's hiring was politically motivated. Second, Cunningham asserts that the housing Authority's reason, a politically motivated appointment, is not a legitimate, non discriminatory reason. As her second ground of error, Cunningham argues that the district court, after

it had taken the case under submission, abused its discretion by ordering the parties to take the deposition of the former mayor specifically for the purpose of developing further facts regarding the Housing Authority's political motivation.[4] This Court finds no error; the judgment of the district court is affirmed.

II. DISCUSSION

(1,2) As a threshold matter, Cunningham asserts that she was not required to prove intentional discrimination. Cunningham misconstrues the law in this circuit. This court

4. The pertinent part of the order stated:
After a conference call with the parties, I ordered that the deposition of the 1977 mayor of Opelousas be taken and filed within 15 days. The defendant was directed to order from the court reporter any testimony that relates to the political relationship between Soileau and the members of the Opelousas Housing Authority Board. After this testimony is transcribed and filed in the record, both parties should file simultaneous briefs within 15 days relating to whether the decision to hire Soileau was a political decision designed to reward a political ally. Record Vol. I at 172.

has stated on a number of occasions that the disparate treatment model of proving discrimination is applicable in situations involving subjective hiring and promotion decisions. Under that model, the plaintiff bears the burden of proving intentional discrimination.

The use of subjective criteria to evaluate employees in hiring is analyzed, not under the desparate impact model, but instead under the disparate treatment model. . . . To prove disparate treatment, the plaintiffs must prove discriminatory intent. . . .

Discriminatory intent may be established by direct or circumstantial evidence.

Walls v. Mississippi State Department of Public Welfare, 730, F. 2d 306, 321-22 (5th Cir. 1984) (Emphasis added, citations omitted). See Vuyanich v. Republic National Bank, 723 F. 2d 1195, 1201-02 (5th Cir.), cert. denied, -- U.S. --, 105 S.Ct. 567, 83 L. Ed. 2d 507 (1984); Carroll v. Sears, Roebuck & Co., 708 F. 2d 183,

188 (5th Cir. 1983)("The use of subjective criteria to evaluate employees in hiring and job placement decisions is not within the category of facially neutral procedures to which the disparate impact model is applied.") See also Lewis v. NLRB, 750 F. 2d 1266, 1271 (5th Cir. 1985)(disparate treatment analysis was properly applied to N.L. R.B. subjective promotion procedures). This court holds that the district court properly required Cunningham to prove intentional discrimination.

(3) To establish a prima facie case of sex discrimination in a Title VII case, the complainant must demonstrate that she applied for and was qualified for a job for which the employer was seeking applicants; despite her qualifications, she was rejected; and after her rejection, the position remained open and the employer continued to seek applicants from person of complainant's qualifications. McDonnell Douglas Corp. v. Green, 411 U.S.

792, 802, 93 S. Ct. 1817, 1824, 36 L.Ed. 2d 668 (1973). The district court found that Cunningham met this initial burden. This finding is not appealed.

With that evidence, the burden of production shifted to the Housing Authority "to articulate some legitimate, non discriminatory reason for the employee's rejection." McDonnell Douglas Corp., 411 U.S. at 802, 93 S. Ct. at 1824, 36 L. Ed. 2d at 677; Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 257-58, 101 S. Ct. 1089, 1095-96, 67 L.Ed. 2d 207 (1981). The district Court found that the Housing Authority had successfully rebutted the plaintiff's prima facie case by establishing that the Soileau selection "was merely the reaffirmation of the March 1977 decision by three board members to repay Soileau for his political support of Powers by appointing Soileau as the executive director." Record Vol. I at 188.

Cunningham challenges the district court's conclusion that the Housing Authority successfully rebutted her prima facie case. Cunningham first asserts that the defendant did not articulate that its failure to hire her was politically motivated. Second, Cunningham argues that even if the defendant did articulate its reason, the reason is not a legitimate nondiscriminatory reason.

This court need not reach Cunningham's specific allegations of error. In EEOC v. Exxon Shipping Co., 745 F. 2d 967 (5th Cir. 1984), this Court stated: "(B)y the time a full-tried case reaches us on appeal, the parties' showing at the preliminary levels of the framework is largely irrelevant. . . . We need address only the propriety of the ultimate finding of discrimination vel non." 745 F. 2d at 972 (citations omitted); United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 103 S. Ct. 1478, 1482,

75 L. Ed. 2d 403 (1982); Lyford v. Schilling, 750 F. 2d 1341, 1345 (5th Cir. 1985)(per Curiam) ("Once the case has been fully tried, the need to analyze each separate function of the McDonnell-Burdine analysis 'drops from the case' ").

(4,5) By focusing on the defendant's burden Cunningham seeks to evade the ultimate question of discrimination vel non, Aikens, 103 S. Ct. at 1481, and its review under the clearly erroneous standard, Exxon Shipping, 745 F. 2d at 973. In this case, the district court found that Cunningham failed to prove discrimination on the basis of her sex, and that finding is reviewed under the clearly erroneous standard. Pullman-Standard v. Seint, 456 U.S. 273, 102 S.Ct. 1781, 72 L. Ed. 2d 66 (1982). Cunningham does not specifically argue that the district court's negative determination of the discrimination issue is clearly erroneous. Nevertheless, this Court has carefully reviewed the record, and we are not left with a definite and firm

conviction that a mistake has been committed. United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S. Ct. 525, 541, 92 L. Ed. 746(1948). The district court's finding that Cunningham failed to meet the ultimate burden of proving intentional discrimination is not clearly erroneous.

(6) As a final matter, the plaintiff asserts that the district court abused its discretion by ordering the parties to take the deposition of the former mayor after the court had taken the case under submission. This Court finds no error. Rule 614 of the Federal Rules of Evidence specifically authorizes the district court to call witnesses on its own motion. While this power is more often used in the context of a criminal case, see Fed. R. Evid. 614(a) advisory committee note, courts have called their own witnesses in civil cases as well. One of the reasons for giving the court this authority is so that the court will

not be "imprisoned within the case as made by the parties." Id.

We find that ordering the taking of this deposition is the equivalent of the court calling its own witness. The fact that the court acted after submission of the case did not prejudice the plaintiff. This is particularly true in cases, such as this one, which are tried to the court and not to a jury. The plaintiff's counsel was able to cross examine the witness during his deposition. Moreover, both sides were allowed to submit briefs concerning the relevancy of the former mayor's testimony to the question of the political motivation behind Soileau's hiring. Previously, this Court found no error in a situation where the district court called a witness on its own motion after the party had rested its case. See Capital Marine Supply, Inc. v. M/V ROLAND THOMAS, II, 719 F. 2d 104, 107 (5th Cir. 1983). Likewise, this Court finds no error here.

This Court emphasizes that the instant case was tried to the court, and that the district court retained a posture of impartiality throughout the litigation. There was no abuse of discretion.

III. CONCLUSION

For the reasons stated above, the judgment of the district court is

AFFIRMED.

Appendix "D"

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 84 4481

GLADYS CUNNINGHAM,
Plaintiff-Appellant

VERSUS

HOUSING AUTHORITY OF THE CITY OF OPELOUSAS d/b/a OPELOUSAS HOUSING AUTHORITY,
Defendant-Appellee

Appeal from the
United States District Court
for the
Western District of Louisiana

ON PETITION FOR REHEARING

( August 14, 1985 )

Before REAVLEY, JOHNSON and HIGGINBOTHAM, Circuit Judges. PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

s/Sam D. Johnson 8/9/85
UNITED STATES CIRCUIT JUDGE